Filed 10/31/12 P. v. Nunez CA1/4

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JUAN RICARDO NUNEZ, Defendant and Appellant.	A134586 (Alameda County Super. Ct. No. H50526)

I.

INTRODUCTION

Appellant Juan Ricardo Nunez appeals from his plea and sentence for gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)). He claims the trial court unlawfully chose the aggravated term of 10 years in state prison for the gross vehicular manslaughter conviction, because it improperly: (1) relied on facts not found by a jury or admitted by him; (2) relied on facts to support aggravation of the sentence that are also elements of the underlying conviction; and (3) ignored relevant facts in mitigation. We disagree and affirm.

II.

PROCEDURAL AND FACTUAL BACKGROUNDS

An information was filed by the Alameda County District Attorney on June 16, 2011, charging appellant with one count of gross vehicular manslaughter of Dennis Adam Splan while intoxicated (Pen. Code, § 191.5, subd. (a)). The information further alleged that the charged offense involved the personal infliction of great bodily injury,

within the meaning of Penal Code sections 1192.7 and 1192.8. The information also charged appellant with one count of driving under the influence causing great bodily injury to Michael Hyland (Veh. Code, § 23153, subd. (a)), one count of driving with a blood-alcohol level greater than .08 percent (Veh. Code, § 23153, subd. (b)), and two counts of hit-and-run driving (Veh. Code, § 20002, subd. (a)).

Appellant initially pled not guilty to all charges and allegations, and waived a preliminary hearing. On October 13, 2011, appellant entered a change of plea based on a negotiated disposition with the prosecution. Under the agreement, appellant pled no contest to counts one and two (Pen. Code, § 191.5, subd. (a), and Veh. Code, § 23153, subd. (a)), and admitted the great bodily injury allegations under Penal Code sections 1192.7 and 1192.8. In return, it was agreed that appellant would be sentenced pursuant to one of two "sentencing structures" to be decided by the trial court. Under the first "structure," appellant would receive a state prison sentence of six years for count one and a consecutive term of eight months for count two. Under the second "structure," appellant would receive a state prison sentence of ten years for count one and a consecutive term of eight months for count two. Other fines and penalties were also included in the plea agreement. As part of the plea, appellant stipulated to a factual basis for the plea as contained in the police report authored by the investigating authorities. After accepting the plea, the court referred the matter to the probation department for a presentence report, and set a sentencing hearing for December 14, 2011.

The factual context for this case is taken verbatim from the presentence report subsequently filed by the probation department, which summarized the police report as follows: "PRESENT OFFENSE [¶] Offense Summary: According to Hayward Police Department Report #2011-1405 on January 27, 2011, at about 7:45 p.m. [appellant] was driving southbound on Hesperian Boulevard when he arrived at West Tennyson Road. A vehicle driven by Jane Doe was stopped at the intersection for a red light. When it turned green [appellant] struck the rear of her car and pushed it into the intersection. Her passenger exited in an attempt to contact [appellant] but he sped away at a high rate of

speed. Jane Doe followed [appellant] for a short distance. She memorized his license plate and called 9-1-1.

"[Appellant] continued south on Hesperian Boulevard where he subsequently sideswiped a second car driven by John Doe 1. He again fled at a high rate of speed. John Doe 1 gave chase and accelerated to about 50 miles per hour in an effort to obtain the license plate number but [appellant] was driving too fast. The area is a 35 [miles per hour] zone. John Doe 1 lost sight of [appellant] but came upon him moments later at the scene of a collision.

"Officers responded to the intersection of Hesperian Boulevard and Arf Avenue where they found that [appellant]'s vehicle had crashed into a tree in the center median. The force of the impact severed the tree in half at its base. [Appellant] collided with a car driven by . . . [Hyland] who said he was traveling at about 20 [miles per hour] when struck from behind by [appellant]. The impact caused . . . [Hyland]'s vehicle to rotate counter[-] clockwise approximately 115 degrees and launched it into a steel street light pole which was sheared from its base. It then overturned several times before coming to rest in the northbound lanes of Hesperian Boulevard. [Hyland] suffered several fractures to his ribs in addition to abrasions and contusions to his shoulder, arm and abdomen. His passenger, . . . [Splan], sustained major head trauma and was pronounced dead at the hospital at 8:32 p.m. There was no evidence located at the scene which indicated that [appellant] attempted to stop and officers estimated he was driving between 65 to 80 [miles per hour]. When officers contacted him they detected the moderate odor of an alcoholic beverage emanating from his person and observed that he displayed objective symptoms of intoxication. He was extricated from his vehicle by fire department personnel and transported to the hospital. [Appellant] underwent surgery for a dislocated left hip. A toxicology report indicated that his blood[-]alcohol content was .30 [percent].

"[Appellant] was interviewed on January 23, 2011, and told investigators he was driving home from a gathering in Oakland where he consumed a six-pack of beer and two Long Island Iced Teas. He said he had never before driven while intoxicated. [Appellant] also informed [investigators] that he suffers from diabetes and his doctor told

him to stop drinking during the previous year. He said [he] was [*sic*] a social drinker and did so on the weekends."

The report recommended that the trial court sentence appellant to the higher "structure" to which the parties had agreed. In making this recommendation, it noted one aggravating factor: that "[t]he crime involved great violence, great bodily harm, threat of great bodily harm or other acts disclosing a high degree of cruelty, viciousness or callousness," citing rule 4.421 of the California Rules of Court. No mitigating factors were noted. In its "Evaluation," the report emphasized that appellant's drinking and driving resulted in three separate accidents causing one fatality. It noted that his blood-alcohol level was "close to four times the legal limit." "Given the loss of life needlessly cut short, serious injuries inflicted upon another victim and his fleeing the scene of two accidents, his imprisonment for the maximum term permitted is warranted."

The sentencing hearing was held on December 14, 2011. In addition to numerous letters submitted in support of appellant, the court also heard from several family members of the victims. Addressing the court, appellant's counsel argued that the probation report was "wrong" in recommending the aggravated term. Counsel claimed that since appellant pled guilty to gross vehicular manslaughter while intoxicated under Penal Code section 191.5, subdivision (a), which necessarily included great violence and gross negligence, neither factor could be used as an aggravating circumstance. Counsel's point was that since the specified basis for the probation department's recommendation was also an element of the underlying crime of vehicular manslaughter while intoxicated, it could not be used as a basis for imposing the aggravated term. (See Cal. Rules of Court, rule 4.420(d) ["[a] fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term"].) Counsel also argued that there were several factors in mitigation that should be considered in sentencing appellant, including that appellant had an insignificant criminal history and that he acknowledged wrongdoing at an early stage of the criminal process.

After hearing from both sides the court stated its determination to "adopt the probation report." The court expanded: "This did involve not just one accident, but three

separate accidents. And not just beyond the legal limit, but almost four times the legal limit. I will impose the ten-year eight-month sentence."

III.

LEGAL DISCUSSION

A. Has Appellant Waived His Challenge to the Imposition of the Aggravated Term?

On appeal, appellant's primary objection to his sentence is that there were no aggravating factors articulated by the trial court that were not also elements of the underlying crime of gross vehicular manslaughter while intoxicated. Therefore, appellant claims the court was prevented by law from relying on those facts to choose the aggravated "sentence structure." (*People v. Sandoval* (2007) 41 Cal.4th 825, 848 (*Sandoval*).)

While the Attorney General concedes that appellant ordinarily may appeal from the sentencing choice made by the trial court without the need for a certificate of probable cause (Pen. Code, § 1237.5, subds. (a), (b); *People v. Shelton* (2006) 37 Cal.4th 759, 766), she argues that appellant's waiver of appellate rights as part of the plea prevents appellant from attacking the sentencing choice on appeal.

We agree with appellant that the general waiver of appellate rights made at the time his plea was entered did not serve to waive any legal error made during the subsequent sentencing. This is essentially one of the holdings in *People v. French* (2008) 43 Cal.4th 36 (*French*). In *French*, the defendant pleaded no contest to several offenses under the terms of a plea agreement that contained a stipulated maximum sentence. (*Id.* at p. 42.) The trial court imposed an aggregate sentence equal to the stipulated maximum sentence. The aggregate sentence included an upper-term sentence for one of the offenses. (*Id.* at p. 43.) The defendant challenged the upper-term sentence on the ground it violated his Sixth Amendment right to a jury trial. (*Id.* at p. 40.) In opposition, the People argued the defendant's stipulation to the factual basis for the plea supplied by the prosecution at the change of plea hearing constituted an admission to a particular aggravating circumstance. (*Id.* at p. 50.)

Our Supreme Court held that "by entering into a plea agreement that included the upper term as the maximum sentence," the defendant "did not implicitly admit that his conduct could support that term." (*French, supra*, 43 Cal.4th at p. 48.) The court reasoned that a "*defendant who enters into an agreement to plead guilty or no contest, with a sentence to be imposed within a specified maximum, reasonably expects to have the opportunity to litigate any matters related to the trial court's choice of sentence—including the existence of aggravating and mitigating circumstances—at the sentencing hearing.*" (*Id*. at p. 49.)

Similarly, in *People v. Vargas* (1993) 13 Cal.App.4th 1653, the court held that a waiver of appellate rights agreed to as part of a negotiated plea did not preclude a later appeal by the defendant alleging sentencing errors occurring after the time the waiver was made. (*Id.* at p. 1662.) The holding in *Vargas* was endorsed by our Supreme Court in *People v. Panizzon* (1996) 13 Cal.4th 68. There, the court recognized that "a defendant's general waiver of the right to appeal, given as part of a negotiated plea agreement, will not be construed to bar the appeal of sentencing errors occurring subsequent to the plea" that "were left *unresolved* by the particular plea agreements involved." (*Id.* at p. 85.) One appellate case has explained this rule as follows: "[A] waiver of appeal rights does not apply to ' "possible future error" [that] is outside the defendant's contemplation and knowledge at the time the waiver is made.' [Citations.]" (*People v. Mumm* (2002) 98 Cal.App.4th 812, 815.)

In the instant case, we conclude that the sentencing issues raised by appellant in this appeal were not waived because they were not within appellant's contemplation and knowledge at the time the waiver of the right to appeal was made. Consequently, we proceed to address these issues on their merits.

B. Does the Sixth Amendment Require Appellant to Admit the Aggravating Circumstances Used to Support the Upper Term?

Appellant claims his Sixth Amendment rights were violated by the imposition of an upper-term sentence for gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)) when the upper term was based on aggravating circumstances that

were never admitted by him. He points out that, although his defense counsel stipulated that there was a factual basis for his plea, he "never admitted the truth of facts relied on by the Court at his sentencing—that this 'did not involve just one accident, but three separate accidents. And not just beyond the legal limit, but almost four times the legal limit."

In making this argument appellant relies on *French*, *supra*, 43 Cal.4th 36, which in turn relied upon *Cunningham v. California* (2007) 549 U.S. 270 for the proposition that where the defendant has entered a plea of guilty or no contest, an upper term may not be imposed except when based on circumstances admitted by the defendant or submitted to a jury and found beyond a reasonable doubt. However, as the Attorney General points out, by the time appellant was sentenced, it was constitutionally permissible for the trial court to impose the upper-term sentence for gross vehicular manslaughter while intoxicated (Pen. Code, § 191.5, subd. (a)) without any additional jury findings or admissions by appellant.

By way of background, under the former version of California's Determinate Sentencing Law (DSL), the trial court was required to impose the middle term in the absence of aggravating or mitigating circumstances, but was authorized to make its ultimate sentencing choice based on its own findings relative to such factors under a preponderance of evidence standard. (*Sandoval*, *supra*, 41 Cal.4th at p. 836.) "In *Cunningham*, the United States Supreme Court . . . concluded that California's DSL [did] not comply with a defendant's right to a jury trial. '[U]nder the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence.' [Citation.]" (*Id.* at p. 835.)

In response, the Legislature amended Penal Code section 1170, subdivision (b), effective March 30, 2007 as urgency legislation (Stats. 2007, ch. 3, § 2) to eliminate the statutory presumption for the middle term and, instead, to grant the trial court full

discretion to impose the upper, middle or lower term. (See Pen. Code, § 1170, subd. (b) ["[w]hen a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court"].)

Appellant was sentenced on December 14, 2011, long after this emergency legislation went into effect. Accordingly, it was not necessary for the trial court to rely on facts admitted by appellant when sentencing him to the upper term. Instead, as set forth in Penal Code section 1170, subdivision (b), the choice of term rested within the "sound discretion" of the court. Accordingly, while the court was required to set forth the reasons for imposing the term selected, in establishing its reasons, the court was entitled to rely on the information in the probation officer's report.

C. Did the Court Properly Impose the Upper Term for Gross Vehicular Manslaughter While Intoxicated?

Appellant next claims that "[i]n this case, the facts cited by the trial [c]ourt in support of its decision to impose the aggravated term were the other accidents and [appellant's] blood[-]alcohol level . . . both of which would also have been elements of the crime of gross vehicular manslaughter." Since a fact that is an element of the crime cannot be used to impose the upper term, appellant argues the trial court abused its sentencing discretion when it imposed the upper term. (See Cal. Rules of Court, rule 4.420(d) ["[a] fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term"].)

Penal Code section 191.5, subdivision (a), provides: "(a) Gross vehicular manslaughter while intoxicated is the unlawful killing of a human being without malice aforethought, in the driving of a vehicle, where the driving was in violation of Section 23140, 23152, or 23153 of the Vehicle Code, and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act that might produce death, in an unlawful manner, and with gross negligence."

Thus, the elements of this crime are: (1) driving a motor vehicle while having a blood-alcohol level of at least .08 percent; (2) while driving under the influence the defendant committed a misdemeanor, infraction, or an otherwise lawful act that results in the death of another; and (3) the defendant committed the act specified in (2) in a grossly negligent manner. (CALCRIM No. 590.)

The term "gross negligence" has been defined by our Supreme Court as follows: " '[G]ross negligence is the exercise of so slight a degree of care as to raise a presumption of conscious indifference to the consequences. [Citation.] "The state of mind of a person who acts with conscious indifferences [*sic*] to the consequences is simply, 'I don't care what happens.' " [Citation.] The test is objective: whether a reasonable person in the defendant's position would have been aware of the risk involved. [Citation.]' (*People v. Bennett* (1991) 54 Cal.3d 1032, 1036 . . . .)" (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1204.)

We note that in examining whether the trial court improperly used facts that were also elements of the underlying offense to aggravate his sentence, "where the facts surrounding the charged offense exceed the minimum necessary to establish the elements of the crime, the trial court can use such evidence to aggravate the sentence. [Citation.]" (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562 (*Castorena*).)

In *Castorena*, the defendant was convicted of the same crime as appellant; gross vehicular manslaughter while intoxicated. In sentencing the defendant in that case, the trial court relied on the following facts to impose the aggravated term in state prison: " 'The evidence clearly demonstrated the defendant was malicious in his conduct and that such conduct involved planning. . . . After having been told he was too drunk to drive, after having his keys taken away and after being offered another means of transportation, defendant drove anyway, apparently because he would have been inconvenienced [because he needed to have his keys to drive to work the next day]. [¶] In addition, . . . the evidence demonstrated that the defendant in his driving was attempting to avoid detection. Also, while an element of this crime is gross negligence, defendant's conduct exceeded even the word gross. While at almost three times the legal limit of blood

alcohol[,] it was .20, as I recall, he drove at speeds up to 100 miles an hour on the wrong side of the road running several red lights and narrowly missing injury to several other persons after having consumed 10 to 12 glasses of beer and 4 glasses of brandy. . . . [¶] . . . [¶] Because of the gravity and weight of the aggravating factors, defendant is sentenced to the upper term of 10 years in state prison.' " (*Castorena*, *supra*, 51 Cal.App.4th at pp. 561-562, fn. omitted.) The judgment was affirmed after the appellate court concluded that the facts relied on by the trial court went beyond the minimum needed to support the underlying conviction. (*Id.* at p. 563.)

Appellant here attempts to distinguish *Castorena*, arguing that the facts there went "far beyond the circumstances in this one." We disagree, and find the trial court properly imposed the upper term based on the aggravated nature of the underlying facts of this offense, which exceeded those necessary to establish vehicular manslaughter with gross negligence while intoxicated. As in *Castorena*, appellant's conduct was egregious beyond the point of simply being "gross negligence." The sentencing judge noted that appellant was involved in three separate accidents, and that he had a blood-alcohol level of .30 percent, almost four times the minimum to support a conviction under Penal Code section 191.5, subdivision (a)—which was a blood-alcohol level even higher than Castorena's. The court's reliance on these facts, which went far beyond those necessary

to prove the underlying crime, was proper, and did not constitute an unlawful dual use of facts.[1]

Appellant also claims that in imposing the upper term, the trial court wrongly ignored several "undisputed" mitigating factors, such as his insignificant prior record (Cal. Rules of Court, rule 4.423(b)(1)) and the fact that he voluntarily acknowledged wrongdoing at an early stage of the criminal process (Cal. Rules of Court, rule 4.423(b)(3).) However, a trial court has no obligation to make an express statement of reasons as to why it deemed the proffered factors in mitigation insignificant. Thus, unless the record affirmatively indicates to the contrary, a trial court is presumed to have considered all relevant criteria, including any mitigating factors. (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317-1318.)

Appellant has failed to cite anything in this record that would undermine the presumption that the court considered, but was not persuaded by, the mitigating factors that were argued at the sentencing hearing. (See *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1317-1318, fns. omitted.) Consequently, appellant has failed to show an abuse of discretion; and there is no need to remand the matter for resentencing.

IV.

DISPOSITION

The judgment and sentence are affirmed.

---

[1] While not specifically articulated during sentencing, the court noted that it was "adopt[ing]" the probation department's report in imposing the aggravated term. Included in that report was the additional fact in aggravation that appellant attempted to avoid the consequences of his actions by fleeing the scene of the fatal accident. This fact, which was not necessary in order to prove gross vehicular manslaughter, also supports the conclusion that appellant acted with "viciousness or callousness" in the manner in which he committed the underlying crime. In *People v. Velasquez* (2007) 152 Cal.App.4th 1503, the court concluded that the upper term was justified where the probation officer's report was "considered" by the trial court at sentencing and that report indicated that there were two recidivist factors justifying imposition of the aggravated term, although the trial court did not articulate on the record its specific reasons for imposing the upper term. (*Id*. at pp. 1512, 1515-1516.) Similarly, the trial court's adoption of the probation report here incorporated those aggravating factors expressly stated in the report, which serves as additional support for the court's sentencing choice.

_____
RUVOLO, P. J.

We concur:

_____
REARDON, J.

_____
RIVERA, J.